Supreme Court, U.S.
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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL NO. 433 BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent, Bakery, Confectionery & Tobacco Workers' Union Local No. 433 (Union), supplements as follows the Statement of the Case set out by Petitioners.

The collective bargaining agreement, which covered the terms and conditions of employment of both the Petitioners and the Intervenors, contained no provision dealing with how to merge or consolidate seniority lists in the event one employer party to the contract sold its business to another employer party to the contract. (Intervenor's Brief in Opposition to Petition for Writ of Certiorari at App. 47-90). This fact was noted by the Trial Court in its decision in the remedy trial (Petition for Writ of Certiorari at App. 12) and by the Court of Appeals in its decision. (Petition for Writ of Certiorari at App. 3).[1]

The issue of how to merge the two work forces was not presented to the jury at the liability trial in either the instructions to the jury or the special verdicts. (Petition for Writ of Certiorari at App. 87-100). The Trial Court in the remedy trial did not find the jury to have decided the merger issue. (Petition for Writ of Certiorari at App. 16). And, the Court of Appeals expressly noted: "the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would

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[1] This observation was also made by the arbitrator, who heard the original grievance filed by the Petitioners (Petition for Writ of Certiorari at App. 118); by the Trial Court in its judgment NOV after the liability phase of the case (Petition for Writ of Certiorari at App. 70), and by the concurring and dissenting judge in the opinion in the first appeal. (Petition for Writ of Certiorari at App. 60-1).

have ended up with the jobs after negotiations". (Petition for Writ of Certiorari at App. 5). The issue remained to be resolved in the remedy phase of the proceedings.

In the liability trial, the Union had contended it did not have a duty to engage in negotiations with Respondent, Metz Baking Company (Metz), in 1983 regarding the work force merger issue and had fulfilled its duty toward Petitioners by submitting the issue to arbitration. The jury and, on the first appeal, the Court of Appeals found to the contrary. (Petition for Writ of Certiorari at App. 44-8, 97). As a result on remand, remedies for breach of the duty to negotiate were also before the Trial Court.

Recognizing the need to resolve these matters in the remedy phase of the proceedings, the Court of Appeals gave the District Court on remand specific instructions. The Court stated:

> The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation their remedy would be merely a declaratory judgment and perhaps nominal damages. 826 F.2d 755, 760 n.1.

In regard to these instructions, the Court of Appeals later interpreted them. "We expressly directed the District

Court to determine 'who would have voted to ratify a negotiated solution' so it could ascertain what would have occurred – that is, what the solution would have been – but for the failure to negotiate." (Petition for Writ of Certiorari at App. 4-5).

Pursuant to these directions from the Court of Appeals, the Trial Court determined that if the Union and Metz had negotiated regarding the work force merger issue in 1983, the negotiated solution of the issue would have been to endtail the Petitioners on a merged seniority list. (Petition for Writ of Certiorari at App. 20). Further, the Court found no arbitration to resolve the issue would have been required, if negotiations had occurred. (Petition for Writ of Certiorari at App. 20). The Court of Appeals upheld these findings. (Petition for Writ of Certiorari at App. 6).

Based on those findings, the Trial Court awarded the Petitioners damages in the form of lost wages for the period from the time of their layoffs to June 15, 1983, when it determined the required negotiations would have been completed. (Petition for Writ of Certiorari at App. 20-2). The Trial Court also denied the Petitioners' requests for attorneys' fees and for prejudgment interest. (Petition for Writ of Certiorari at App. 32).

In regard to attorneys' fees, the Court noted:

> Plaintiffs argue that they should be allowed to recover the attorney fees as an element of damages, not as fees per se. Although other circuits have allowed such recovery, *See* e.g. *Scott v. Local Union 377, International Brotherhood of Teamsters, etc.*, 548 F.2d 1244, 1246 (6th Cir. 1977), the Eighth Circuit has expressly held that attorneys'

> fees may not be considered as compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978). ("Attorney's fees incurred in bringing a § 301 action do not rise to the status of compensatory damages"). (Petition for Writ of Certiorari at App. 29-30).

In its appeal, however, the Petitioners did not raise as an issue or argue that the Trial Court had erred in this conclusion. Rather, Petitioners contended only that the lower court had erred in failing to find "bad faith" action by the Union and Metz sufficient to support an award of attorneys' fees. (App. at 2-7).

On the attorneys' fees issue, the Court of Appeals concluded:

> The Plaintiffs' next argument is that the District Court erred in denying attorneys' fees and prejudgment interest. With regard to attorneys' fees, the Plaintiffs claim that we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees. The Plaintiffs are straining a bit on this argument. The question of bad faith sufficient to justify an award of attorneys' fees was never before this Court. Assuming for the sake of argument that it was before us and that we found bad faith, whether or not to award attorneys' fees was still within the District Court's discretion, and we do not think that discretion was abused here. (Petition for Writ of Certiorari at App. 8).

Finally, the Trial Court denied Petitioners' request for prejudgment interest. In affirming the Trial Court's decision, the Court of Appeals noted: "Like attorneys' fees, an award of prejudgment interest is within the discretion

of the trial judge; it is never automatic. We see no evidence here that the District Court abused its discretion". (Petition for Writ of Certiorari at App. 8).

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT OR ESTABLISHED PRECEDENT UNDER IT.

Petitioners contend the decision of the Court of Appeals conflicts with Section 8(d) of the National Labor Relations Act and runs counter to basic federal labor policy. The Union urges the Petitioners' arguments lack merit for two basic reasons. First, examination of Petitioners' claims reveals that they rest on a fundamental mischaracterization of the jury's findings in the liability phase of this case. Second, the Trial Court's and the Court of Appeals' decisions follow established law of damages, which does not conflict with Section 8(d) of the labor statute. The Union considers both of these reasons for rejecting the Petitioners' position in order.

First, Petitioners claim "the issue presented and decided at the liability trial was the claim of the Petitioners to superior seniority rights as between the two groups of employees". (Petition for Writ of Certiorari at 15-16). Their superior seniority rights according to the Petitioners stemmed from the provisions of the collective bargaining agreement between the Union and their former employer, which contract Metz had been found by the jury to have assumed. The Petitioners contend the

Trial Court and the Court of Appeals stripped them of these rights in their decisions in a manner which conflicts with Section 8(d) of the NLRA because their contract rights can be altered only through actual negotiations between the Union and their new employer, Metz, and no negotiations ever occurred.[2] And, in turn, the Petitioners' damages must be measured based on their "superior seniority" rights under that contract (i.e. their rights to have continued in employment from March, 1983, to the present time and beyond), until those rights are lawfully altered pursuant to Section 8(d), and cannot be measured by the "hypothetical" negotiated settlement of the work force issue used by the Trial Court in determining damages.

The Petitioners' argument is based on a fundamental mischaracterization of the jury's findings in the liability trial. In its opinion, the Court of Appeals specifically found: "the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to

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[2] At the same time, the Petitioners also argue that even the Union and Metz could not have negotiated a change in their seniority rights because they lacked "objective justification" to do so. (Petition for Writ of Certiorari at 19). This notion of the Petitioners also lacks merit. Intervenors, too, had a contract and seniority rights with Metz. Metz survived the sale as the employer. And, the Intervenors were performing the same work after the sale and consolidation of operations as before those events took place. Those facts provide ample grounds to alter Petitioners' claimed superior seniority rights in negotiations. And, negotiations to do so would not have fallen outside the Union's "wide range" of discretion in negotiating a reasonable solution to the merger issue. *Air Line Pilots Ass'n. Int'l. v. O'Neill*, 499 U.S. ___, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991).

decide who would have ended up with the jobs after negotiations". (Petition for Writ of Certiorari at App. 5). This finding is in direct conflict with the Petitioners' assertion that the jury in the liability trial had determined that they possessed seniority rights superior to those of the Metz workers at the Leavenworth Street plant. Brief review of the record supports the finding of the Court of Appeals, not Petitioners' claim.

The parties' pre-trial order does not identify the merger of the seniority of the two employee groups as a triable issue at the liability trial. (Petition for Writ of Certiorari at App. 101-112). The jury's special verdicts do not ask the jury to determine the merger issue. The instructions to the jury do not refer to the possible methods for combining the seniority lists of the two groups. (Petition for Writ of Certiorari at App. 87-100). Post trial first in 1985 and in a later pre-trial order, the basis (dovetailing, endtailing, etc.) upon which damages were to be computed was identified as a remedy issue. (App. 10, 20). And, in its opinion in the first appeal, the Court of Appeals suggested dovetailing as a possible solution to the merger issue. (Petition for Writ of Certiorari at App. 47). In short, the record amply justifies the finding of the Court of Appeals that the jury *did not* grant the Petitioners seniority rights superior to those of the Intervenors in its verdicts.

Put succinctly, because the jury had not granted the Petitioners seniority rights superior to those of the Intervenors, no "superior seniority" rights of the Petitioners existed, which either the Trial Court or the Court of Appeals could take away. Accordingly, the decisions of the Trial Court and the Court of Appeals did not conflict

with the terms of Section 8(d) of the NLRA, since they did not alter or modify any existing rights of the Petitioners under any collective bargaining agreement.

Second, the Trial Court's and Court of Appeals' decisions follow the established law of damages in fair representation cases. And, application of those doctrines to the Petitioners' claims in this case does not conflict with Section 8(d) of the NLRA. Examination of relevant precedent, consideration of the Courts' findings and analysis of the rulings' relationship, if any, to Section 8(d) support the Union's position.

In its ruling in the first appeal, the Court of Appeals remanded the action to the District Court "for determination of relief". (Petition for Writ of Certiorari at App. 58). In regard to suits claiming a breach of a union's duty of fair representation, remedies "should be fashioned to make the injured employee whole". *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 49, 99 S.Ct. 2121, 2126, 60 L.Ed.2d 698, 705 (1979). In turn, an "appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach". *Vaca v. Sipes*, 386 U.S. 171, 195, 87 S.Ct. 903, 919, 17 L.Ed.2d 842, 861 (1967). And, specifically in regard to damage remedies, this Court in employment-related cases has held that an injured worker should be returned only to the position the employee would have been in but for the illegal conduct. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed.2d 1271 (1941).

The jury, with the approval of the Court of Appeals, had determined that the Union had acted wrongfully in

failing to negotiate with Metz regarding the work force merger issue in 1983, and, instead, in submitting the issue directly to an arbitration.[3] As a result, the Trial Court and the Court of Appeals in their rulings simply determined what would have taken place but for the Union's improper conduct in 1983. Finding the answer to that inquiry, the Union urges, was mandated by this Court's precedent, since it comprised the only way to make the Petitioners whole for their loses due to the Union's breach of its duty.[4] And, these rulings do not conflict with Section 8(d) of the NLRA.

In *NLRB v. American Insurance Co.*, this Court set out the genesis and purpose of Section 8(d) in its present form. The Court explained:

> In 1947, the fear was expressed in Congress that the board "has gone very far, in the guise of

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[3] The Union did not attempt to negotiate with Metz over the issue in 1983 because it did not believe a negotiated resolution of the work force issue could be reached fairly. In turn, it did not believe it had a duty to bargain over the matter and submitted it instead to arbitration. The jury faulted this reasoning, apparently believing the affected employees should have been allowed to decide the merger issue. The Union has consistently noted a negotiated resolution of the merger issue would preclude an arbitrated solution. (App. at 13).

[4] The Petitioners assumed before the Trial Court, the Court of Appeals and this Court that the jury had awarded them seniority rights superior to the Intervenors and had determined that negotiations would necessarily have produced a result giving them the disputed jobs. Based on those assumptions, the Petitioners never attempted to prove anything further in regard to the causal link between the Union's conduct and their damages as the Court's precedent requires.

> determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make." Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submission of counter-proposals. As amended in the Senate and passed as the Taft-Hartly Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.
>
> Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed., 1027, 1037 (1952).

In turn, the rulings of the lower courts in these proceedings did now run afoul of the provisions of Section 8(d) because they do not force contract terms upon unwilling parties but only make a calculation of damages based upon the terms of a collective bargaining agreement to which the parties to the contract would likely have agreed in negotiations. *International Union of Electrical,*

Radio and Machine Workers v. NLRB, 426 F.2d 1243 (DC Cir. 1969) *cert. denied* 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256 (1970) *appeal on remand* 502 F.2d 349 *cert. denied* 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed.2d. 226 (1974), 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975). (426 Fed. 2d 1243 at 1252: "The Board cannot be faulted on the ground that it is imposing contract terms upon an unwilling employer when it is engaged only in a determination of a means of calculating a remedy to compensate for injury sustained from an unfair (and unlawful) labor practice.")

In short, the Petitioners' claim that the decision ofthe Court of Appeals conflicts with Section 8(d) of the NLRA lacks merit because the ruling simply follows and applies the relevant law of damages. And, following that precedent does not conflict with Section 8(d) because it does not result in compelling either the Union or Metz to accept any contract terms.

In summary, the Petitioners' argument that the Court of Appeals' decision is contrary to the dictates of Section 8(d) of the NLRA misses its mark. The argument rests on the incorrect assertions that the jury had granted the Petitioners seniority rights superior to those of the Intervenors and that the Courts took those contractual rights away from them without bargaining. Further, the argument ignores the fact that the Court of Appeals' decision follows established law of damages and does not, in turn, unlawfully impose any new contract terms on the parties to any collective bargaining agreement, which is the vice, which Section 8(d) is intended to eliminate.

II. THE PETITIONERS HAVE NOT PRESERVED AN ISSUE REGARDING THE COURT OF APPEALS' RULING ON THEIR REQUEST FOR ATTORNEYS' FEES

The Petitioners argue a split in the Circuit Courts exists on whether attorneys' fees comprise an element of compensatory damages in an action involving the breach of a union's duty of fair representation. (*See citations* Petition for Writ of Certiorari at 20-4). The Petitioners, however, did not preserve that issue in the Court of Appeals to permit review by this Court. Brief review of the proceedings below supports the Union's position.

The Trial Court did note that the Eighth Circuit Court of Appeals has held that attorneys' fees do not comprise an element of compensatory damages in this type of case. The Trial Court further found the Petitioners had not demonstrated "bad faith" by the Union and Metz to warrant awarding attorneys' fees otherwise. In the Court of Appeals, the Petitioners did not raise as an issue or argue that the Trial Court had erred in finding attorneys' fees did not constitute an element of damages. Rather, the Petitioners argued the impropriety of the Trial Court's findings concerning "bad faith". (App. at 2-7). Correspondingly, the Court of Appeals limited its opinion to discussing and affirming the Trial Court's ruling on the "bad faith" issue. The Petitioners simply ignore the state of the record in this regard in their Petition before this Court.

The Union urges the Petitioners' failure to present the compensatory damage issue to the Court of Appeals compromises a fatal defect in its position before this

Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1602 n.2, 26 L.Ed.2d 142, 148 n.2 (1970).

III. PETITIONERS' CLAIM FOR PREJUDGMENT INTEREST PRESENTS NO SUBSTANTIAL QUESTION REQUIRING REVIEW BY THE COURT

The Petitioners urge the Court to review the Trial Court's and the Court of Appeals' decision not to award them prejudgment interest. They invite the Court to require the federal courts in actions involving a breach of a union's duty of fair representation to follow the current policy of the National Labor Relations Board, which the Petitioners note is to grant prejudgment interest on all backpay awards.

The Union urges the Court of Appeals' ruling presents no substantial issue requiring the Court's review and certainly not necessitating the Court's restriction of federal court discretion in fair representation suits. Consideration of established law and the facts in this case demonstrates the Court of Appeals' decision does not present a substantial issue requiring review by this Court. Further, requiring the federal courts to follow current National Labor Relations Board policy is improper. The Union considers both facets of its position in turn.

Foremost, it is well established that an award of prejudgment interest is within the Trial Court's discretion. *Blau v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); *Board of Commissioners of the County of Jackson*

v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939). The Court of Appeals concluded the Trial Court did not abuse its discretion in refusing to award the Petitioners prejudgment interest. (Petition for Writ of Certiorari at App. 8). Brief review of the relevant facts in these proceedings supports the Court of Appeals' conclusions.

The proceedings below did not permit the amount of damages to be ascertained until the remedy phase of the case. From its issuance in 1983 to July 16, 1985, the original decision by Arbitrator Doyle, which upheld the endtailing of the Petitioners, had determined the rights of the parties. Again, Doyle's ruling was resurrected and clearly in effect between the ruling on the Motions for Judgment NOV on August 13, 1986, and the Court's decision in the first appeal in August, 1987. Given those circumstances, the question as to whether any damages might be owing to the Petitioners was uncertain for significant periods of time in this litigation. In turn, denying prejudgment interest was proper, since determining damages earlier was not possible. *Laday v. Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 422 F.2d 1168, 1171-72 (7th Cr. 1970).

Further, in the remedy trial, the basis for computing damages remained an issue. (App. at 10, 20). Additionally, issues regarding mitigation of damages and deductions from back pay awards remained subject to decision by the Court and proof at the remedy trial. (App. at 14-24). Accordingly, the issues to be decided in regard to damages in this case precluded finding that the damages owing were readily ascertainable prior to trial, since

those issues involved basic questions regarding the basis for computing the damages, the proper elements of the damages and specific individuals' entitlement to damages. Accordingly, the Court of Appeals correctly concluded denying prejudgment interest did not comprise an abuse of discretion by the Trial Court because "the damages were unliquidated and could not be ascertained prior to judgment". *Noranda Aluminum Inc. v. United Bhd. of Carpenters*, 528 F.2d 1304, 1310 (8th Cir. 1976) *cert. denied* 429 U.S. 835, 97 S.Ct. 101, 50 L.Ed.2d 100 (1976).

Since the amount of damages owing remained uncertain up to the time of the remedy trial, allowing prejudgment interest would be unfair for two reasons. First, such an award running from 1983 would have substantially increased the damages owing and would make the Petitioners more than whole. In turn, denying prejudgment interest is fair because otherwise the award would be penal, not compensatory, in nature. *IAM Lodges 743 and 1746 v. United Aircraft Corp.*, 534 F.2d 422, 447 (2d Cir. 1975) *cert. denied* 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976).

Second, any delay in ultimately ascertaining the damages owing results to a large degree from the uncertainty as to liability. Further, after liability was established in 1987, the magnitude of the damage claims by the Petitioners (back pay and future damages for 40 people) made substantial preparation concerning them necessary. In turn, awarding prejudgment interest would have been inequitable, since the Union and Metz did not improperly contribute to the delay.

The Union urges the Trial Court did not abuse its discretion in failing to award the Petitioners prejudgment interest because the inability to ascertain the damages owing, if any, prior to the remedy phase of the trial made an award of interest patently unfair. And, in turn, the Court of Appeals acted properly in upholding the Trial Court's decision.

In short, the Petitioners' request for review of the Court of Appeals' ruling concerning prejudgment interest enmeshes this Court in a very fact specific review of the record to determine whether the rulings in the lower courts comprise an abuse of discretion. Accordingly, the Petitioners' request presents no substantial legal issue by its nature. And, under the circumstances, the request has no basis on the merits, since the Court of Appeals correctly concluded the Trial Court did not abuse its discretion.

The Petitioners seek to overcome these conclusions in regard to the prejudgment interest issue by urging the Court to require the federal courts in duty of fair representation actions to follow current National Labor Relations Board policy concerning interest on backpay awards. The Union submits the court should reject the Petitioners' invitation on, at least, three grounds.

First, the National Labor Relations Board's current policy in regard to interest on backpay awards is simply part of the agency's discretionary power to fashion remedies for unfair labor practices, which it believes will effectuate the purposes of the National Labor Relations Act. *E.g. NLRB v. My Store, Inc.*, 468 F.2d 1146, 1152 (7th

Cir. 1972); *NLRB v. Zimnox Coal, Co.*, 336 F.2d 516, 518 (6th Cir. 1964); *Marshfield Steel Co. v. NLRB*, 324 F.2d 333 (8th Cir. 1963)[5] But, even the Board's discretion is limited. This Court has held the National Labor Relations Board cannot simply apply its usual remedy in every case without regard to the circumstances of a particular matter. *NLRB v. Dist. 50, United Mine Workers*, 355 U.S. 453, 78 S.Ct. 386, 2 L.Ed.2d 401 (1958). In essence, then, contrary to the Petitioners' suggestion, the National Labor Relations Board's current policy, like current case law, is at core discretionary. In turn, the Petitioners' proposal to require the federal courts to follow the policy in all fair representation cases involves no significant change in the applicable standard for awarding prejudgment interest, since even under the Board rule the Courts must determine whether an award of interest is appropriate under the facts of a particular case.

Second, this Court has expressly held that the federal courts are not pre-empted by the NLRA from hearing claims involving a claimed breach of a union's duty of fair representation. *Breininger v. Sheet Metal Workers Int'l. Ass'n. Local No. 6*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989). In so holding, the Court has noted the separate and distinct interest of the National Labor Relations Board in enforcing federal labor policy from that of the federal courts in providing an injured worker vindication of individual contract rights. *Vaca v. Sipes*, 386 U.S. 171, 195-97, 87 S.Ct. 903, 919-20, 17 L.Ed.2d 842, 851-53 (1967).

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[5] Notably, as stated in these decisions, the National Labor Relations Board did not award interest on backpay awards for many years but changed that practice as a matter of policy.

The Petitioners' argument that the federal courts should be required to follow the Board's policy, in turn, runs counter to this established precedent, since it effectively places the courts in the business of enforcing statutory rights rather than contract rights.

Finally, in this case, the National Labor Relations Board, in fact, refused to issue a complaint when the Petitioners filed an unfair labor practice charge regarding the facts of this case. (App. at 25-27). As a result, requiring the lower courts to apply the National Labor Relations Board policy in this case makes little sense, since the Board has determined to do so is not necessary to effectuate the purposes of the National Labor Relations Act.

In summary, the Union urges the Trial Court's and the Court of Appeals' refusal to award the Petitioners prejudgment interest presents no substantial issue warranting review by this court because such review would involve nothing more than a factual review of the record for abuse of discretion. Further, the Petitioners' invitation to the Court to require federal courts in duty of fair representation actions to apply the current National Labor Relations Board policy on prejudgment interest should be rejected, since the Board's policy is itself discretionary, since the suggested restriction on the courts' discretion runs counter to established precedent, and since the award of interest is not needed in this case to effectuate federal labor policy.

CONCLUSION

For the foregoing reasons, the Union urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX OF RESPONDENT BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL NO. 433

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3549
91-3553
92-1563
92-1591

SELMAN (JOE) THOMAS, JR., et al.
Plaintiffs-Appellants/
Cross-Appellees.

vs.

BAKERY, CONFECTIONERY AND TOBACCO
WORKERS UNION LOCAL NO. 433 and
METZ BAKING COMPANY,

Defendants-Appellees

and

CURTIS BURTON, et al.,

Intervenors-Appellees/
Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

BRIEF OF APPELLANTS/CROSS-APPELLEES

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* * *

IV.

THE DISTRICT COURT ERRED IN FAILING TO AWARD PLAINTIFFS ATTORNEY FEES

The District Court, in its Memorandum Opinion, at 18-19 determined that attorney fees could only be awarded in this action if there was a finding of bad faith and there was no evidence of such in this action. The Trial Court cited *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975) and *Actors Equity Association v. American Dinner Theatre Institute*, 802 F.2d 1038 (8th Cir. 1986) as supportive of its position. A review of the District Court's determination regarding the awarding of attorney fees is usually reviewed under the clearly erroneous standard. *Actors Equity, supra.* Not so with regard to this action. The District Court, in refusing to award attorney fees to the Plaintiffs, violated the law of the case doctrine. See *Bethea v. Levi Strauss, supra.* The District Court is required to conform its opinion and decision to the spirit and intent of the prior Appellate Court's decision. *Houghton v. McDonnell Douglas Corporation, supra.*

This Court's prior Opinion found that the Union had lied to and deceived the Plaintiffs. It further found that the Union was guilty of bad faith. A determination of bad faith in a §301 action constitutes an exception to the "American Rule" that attorney fees are ordinarily not recoverable by the prevailing party in federal litigation absent statutory authorization. *Richardson v. Communication Workers of America, AFL-CIO*, 530 F.2d 126, 132-33, (8th Cir. 1976) specifically addressed this issue. This Court determined that a prior finding of bad faith in a §301 action, wherein an employee was suing his union for

breach of its duty to fairly represent him entitled the Plaintiff to an attorney fee award. This action stands on an identical footing.

The cases referred to by the Trial Court are inapposite because these cases either dealt with a situation where bad faith was not established or the cases did not involve an employee suing the union with regard to a breach of duty of fair representation. Even under the clearly erroneous standard, the District Court erred in not awarding attorney fees. Both the Union and Metz were guilty of bad faith with regard to the events which transpired prior to the commencement of this litigation and during the course of this litigation.

Metz signed an agreement with IBC to purchase the Leavenworth Street facility and to assume the IBC collective bargaining agreement in question, *in toto*. Immediately after execution of that purchase agreement, Metz claimed that Plaintiffs were entitled only to be treated as "new-hires". Metz continued this charade through the course of the arbitration, as reflected by Mr. Lessman's testimony at the liability trial (Ex. 74-A (REC.T:301) T:298), and up to and including the testimony of Mr. Metz at the damage trial (T:383:L.10-394:L.13).

Whether there was ever an agreement, either explicit or implicit, between the Union and Metz as to the handling of the arbitration to assure the defeat of the position adopted by the Plaintiffs will, apparently, never be known. Plaintiffs submit that the testimony of Mr. Lessman, Metz' General Counsel, and Mr. Smith, the Union's attorney, at the liability trial does suggest that such an agreement was made between Metz and the Union.

At the liability trial Mr. Lessman testified that prior to the arbitration hearing he never recalled having any conversations with Mr. Harry Smith regarding the former IBC employees' status or the lay-offs (Ex. 74-A (Rec.T:301) T:99-100; 105-6). He indicated that he seldom dealt with Mr. Smith.

Mr. Smith testified that he had dealt with Mr. Lessman before and that Mr. Lessman's word was good (Ex. 74-A (Rec.T:301) T:164). Mr. Smith later testified as to a telephone conference which he had with Mr. Lessman wherein Mr. Lessman indicated that the sale between IBC and Metz was an asset sale and that in the conversation Mr. Smith had indicated to Mr. Lessman that the only fair thing to do was to go to arbitration and that the two generally discussed theories of the case (Ex. 74-A (Rec.T:301) T:165-66). Thereafter, Mr. Lessman testified, after listening to Mr. Smith, that his memory had been refreshed and that he now recalled not a telephone conference with Mr. Smith but a meeting with Mr. Smith in Mr. Smith's office where the parties reviewed cases and discussed theory regarding this matter. He did not recall reviewing the purchase agreement between IBC and Metz with Mr. Smith, at least he was pretty sure he did not do this (Ex.74-B (Rec.T:301) T:300; 302; 303-4).

As Plaintiffs indicated in their brief submitted with regard to the prior appeal, it is doubtful that anyone on the jury believed that Mr. Smith had never reviewed the purchase agreement between IBC and Metz and that both Metz and the Union intentionally chose to withhold essential facts during the course of the arbitration hearing. That the Union otherwise lied to the Plaintiffs, deceived them and was guilty of bad faith is amply reflected in this Court's prior Opinion.

Both Metz and the Union have been guilty of bad faith with regard to the conduct in this litigation. In December of 1985 the parties entered into a Joint Stipulation identifying the issues with regard to the damage portion of this action. (Joint Appendix at 143). Neither Metz nor the Union have ever abided by this stipulation. In fact when allowed by the Magistrate to amend their answers solely with regard to the affirmative defense of mitigation of damages (Joint Appendix at 247) both Defendants, in their amended answers (Joint Appendix at 263 and 293) raised, without leave of Court the following affirmative defenses: election of remedy; waiver; estoppel; res judicata; collateral estoppel; accord and satisfaction and, the defense which the Trial Court adopted in its interpretation of footnote 1, that if negotiations had been undertaken the Plaintiffs' seniority would have been abrogated, Plaintiffs' end-tailed to the Metz workers and that, therefore the Plaintiffs were barred from any recovery.

Interestingly, most of these defenses arose by reason of a severance pay arbitration originated by the Union (not Plaintiffs) and conducted by Metz and the Union which had its genesis in another law suit between the parties, Selman (Joe) Thomas vs. Interstate Brands Corporation, (Metz defended for IBC) CV83-0-560. This litigation produced a hearing before the late Honorable Richard E. Robinson, the transcript of which is found at Ex. 103d (Rec.T:407).

It is readily apparent that then counsel for Metz, Joe P. Cashen, then counsel for the Union, Harry S. Smith and then counsel for the Plaintiffs, the late Dayton O. Rassmussen, Jr., reached an agreement, in open Court, that the matter of severance pay was not to affect or

impact this litigation (Ex. 103d (Rec.T:407) at 1-14, 38, 40-41). Additionally, Ex. 75 (Rec.T:403-4), a letter from Mr. Kim B. Murphy, in-house counsel for Metz, notified Mr. Burke (a Plaintiff herein) that accepting severance pay would not affect his status in the instant litigation. The Defendant Metz and the Union have simply raised issues which they agreed, in open Court, in another proceeding, that they would not raise.

Both Metz and the Union submitted a second Pre-Trial Order (Joint Appendix at 345) to the lower court inclusive of these issues and contrary to the Joint Stipulation of the parties. The transcript of the final pre-trial conference (Joint Appendix at 388 (at 18-19, 41)) reflects that counsel for the Plaintiffs refused to sign the proposed pre-trial conference order until directed to do so by the Magistrate. The actions of the defendants in raising the issues thus raised, while previously agreeing, on two separate occasions not to so raise these issues, is frivolous and vexatious. Attorney fees are, therefore, properly to be awarded. *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990) Cert. denied, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). A review of the docket sheet in this action reflects the fervor with which the Defendant Metz has continued to litigate these types of issues from the time of remand through the date of the remedy/damage trial.

The District Court's denial of an award of attorney fees even if bad faith had not already been established in the prior liability trial and Circuit Opinion was clearly erroneous.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al. Plaintiff, vs. BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL NO. 433, and METZ BAKING COMPANY, Defendant.	Civil Action 83-0-652 JOINT STIPULATION (Filed December 3, 1985)

COME NOW the plaintiffs by and through their attorney, Thomas J. Young, the Defendant, Bakery, Confectionery and Tobacco Workers Union Local No. 433, by and through its attorneys, MacDonald Smith and John F. Clemens and the Defendant, Metz Baking Company, by and through its attorney, Joe P. Cashen and stipulate and agree as follows:

That the parties hereto wish to submit to the Court issues of law with regard to the damage/remedy portion of this action in order to expedite this action and do hereby agree and stipulate that the following legal issues should be determined by the Court and will control the damage/remedy portion of this action but reserve all objections which each party may have arising by reason of the Court's ruling with regard to said legal issues.

The issues to be determined by the Court are as follows:

1. Whether ordering a new arbitration comprises the appropriate remedy.

2. If so, whether the Court should retain jurisdiction to enforce or vacate the new arbitration award.

3. Even if a new arbitration does not comprise an appropriate remedy, whether Plaintiffs' damages should be measured by what they would have received as a remedy in a fair arbitration.

4. If damages comprise the appropriate remedy, are any or all of the following items to be utilized in determining gross back pay due each Plaintiff:

a. Wages.

b. Overtime pay.

c. Night pay.

d. Earned work credits.

e. Holidays.

f. Vacations.

g. Pension contributions.

h. Life insurance contribution.

i. Health insurance contribution.

j. Medical expenses actually incurred.

k. Seniority rights.

l. Any other "fringe benefit".

5. Are interim earnings of the Plaintiffs to be deducted from the amount of gross back pay due each Plaintiff.

6. Do interim earnings include any or all of the following items:

a. Wages.

b. Overtime pay.

c. Night pay.

d. Earned work credits.

e. Holidays.

f. Vacations.

g. Pension contributions

h. Life insurance contribution.

i. Health insurance contribution.

j. Medical expenses actually paid.

k. Seniority rights.

l. Any other "fringe benefit".

m. Severance pay received from Metz.

n. Pension benefits received.

o. Unemployment compensation benefits received.

p. Any other public or private assistance benefits received.

7. Who has the burden of proving interim earnings, Plaintiffs or Defendants.

8. If the burden of proof is upon the Defendants with regard to interim earnings and Defendants are not

allowed to amend their answers to include the defense of mitigation of damages, are the Defendants allowed to introduce evidence with regard to interim earnings under their pleadings as they presently exist.

9. Are the Defendants to be granted leave to amend their answers to allege that the Plaintiffs have failed to mitigate their damages.

10. If mitigation of damages is an issue, is each Plaintiff required to at least make reasonable efforts to find new employment which is substantially equivalent to the position lost and which is suitable to a person of his/her background and experience.

11. If mitigation of damages is an issue, are offers from Metz to some of the Plaintiffs for part time work without the benefit of seniority or fringe benefits offers of substantially equivalent employment.

12. Is reinstatement, in any form, an appropriate remedy to be enforced in this action.

13. If reinstatement is an appropriate remedy in this action, how is reinstatement to be accomplished.

14. In the event that back pay, reinstatement or future damages are found to be an appropriate remedy in this action, what is the basis for the consideration of such from the standpoint of seniority by reason of "end-tailing", "dove-tailing" or "plant-wide seniority" of IBC employees with Metz employees being "end-tailed".

15. Is an award for future damages an appropriate remedy in this instance.

16. If future damages are to be awarded, are the following elements of future damages:

a. The period of time for which Plaintiff would likely have continued in the employ of the Defendant Metz in the absence of the unlawful discharge.

b. The value of wages, overtime pay and such fringe benefits as seniority rights, paid vacations, insurance benefits, pension and retirement benefits which each Plaintiff could reasonably have expected to received during such period of employment.

c. Deducted from the sum found in b., above, is to be the value of compensation and fringe benefits which an individual, with each Plaintiff's earning capacity, could reasonably be expected, in the exercise of due diligence, to receive from other available employment during this period. Each Plaintiff's present employment is not necessarily such other available employment, but may be given consideration.

d. Is the net amount found by deducting c. from b. to be reduced to its present value.

17. Are attorney fees to be allowed in this action for Plaintiffs' attorney.

18. If attorney fees are to be allowed for Plaintiffs' attorney, will same be awarded on the basis of:

a. A fair and reasonable hourly rate for the attorney times the actual number of hours expended in this action on behalf of the Plaintiffs;

or

b. The time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to acceptance of this case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and the ability of the attorney; the "undesirablity" of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

19. If back pay is awarded in this action, are the Plaintiffs to be allowed prejudgment interest.

20. In any damage award in this action, are the damages to be apportioned between the Defendant Metz and Defendant Union and if so, the method by which damages are to be apportioned. Defendant Union contends that the submission of the apportionment of damages issue is premature at this time.

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ATTORNEYS FOR DEFENDANT
METZ BAKING COMPANY

APPENDIX C

* * *

[p. 24] fact not in evidence, calls for speculation, and I believe it would also require him to testify as to what somebody else would have done. It's hearsay, too.

THE COURT: Overruled. He may answer.

Q. (By Mr. Danberg) Mr. Church?

A. Yes, it would have.

Q. After a contract has been altered, in your opinion, is that a subject on which grievances maybe submitted?

A. No.

Q. What has the position of the union been, if there has been one, with respect to grievances concerning contractual changes, that is grievances after contractual changes that have been ratified?

A. The union position is that a vote of the people in a ratification meeting, the contract would be set.

To do it any other way, you would never have a contracts, because there is always somebody unhappy about part of the contract.

It happens – it has happened quite a few times, but we would generally not process that grievance.

Q. Mr. Church, I want to invite your attention for just a moment to one aspect of the fringe benefits claimed by the plaintiffs in this case and that is the subject of life insurance.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, vs. BAKERY, CONFECTIONERY, AND TOBACCO WORKERS UNION LOCAL NO. 433, et al. Defendants, and CURTIS BURTON, et al., Intervenors.	CV. NO. 83-0-652 ORDER ON PRETRIAL CONFERENCE (Filed March 9, 1990)

A final pre-trial conference was held on the 9th day of March, 1990. Appearing for the parties as counsel were: Plaintiffs, Thomas J. Young, One Pacific Place, 1125 South 103rd Street, Suite 710, Omaha, Nebraska 68114; Defendant Metz Baking Company, Neil B. Danberg, Jr. and William T. Oakes, 10306 Regency Parkway Drive, Omaha, Nebraska 68114; Defendant Bakery, Confectionery and Tobacco Workers Union, Local No. 433, MacDonald Smith, 632-640 Badgerow Building, Sioux City, Iowa 51101; and Intervenors, Maynard H. Weinberg, 8901 Indian Hills Drive, Suite One, Omaha, Nebraska 68114.

A. Exhibits in Evidence.

Exhibit lists will be prepared by each party for submission to the Court and all other parties on or before April 16, 1990.

B. Foundation for Exhibits.

The stipulation or waiver of foundation for all exhibits will be indicated on the exhibit lists to be submitted pursuant to A above.

C. Uncontroverted Facts.

The parties have agreed that the following may be accepted as established facts for purposes of this case only: (~~See attached list~~ *none*).

D. Controverted or Unresolved Issues.

1. Whether the case should be remanded to arbitration (and, if so, what issues should be remanded and whether the Court will retain jurisdiction to enforce or vacate the award; and, if not, whether Plaintiffs' damages should be measured by what they would have received as a remedy in a fair arbitration).

2. Whether Plaintiffs have made reasonable efforts to mitigate their damages (if mitigation is an issue, and if not, what consequence or effects will this have on Plaintiffs' claimed damages).

3. Are Plaintiffs entitled to any back pay and, if so, how will it be calculated (and what amount of interim

earnings, if any, should be deducted and how will interim earnings be calculated).

4. Is reinstatement or reemployment, in any form, an appropriate remedy in this action (and, if so, how is reinstatement or reemployment to be accomplished, and what effect, if any, do Metz' offers of employment to certain of the Plaintiffs have upon this issue).

5. Are Plaintiffs entitled to any future damages and, if so, how will they be computed?

6. Are Plaintiffs entitled to prejudgment interest and, if so, how will it be computed?

7. Are Plaintiffs entitled to an award of attorney's fees against the Union and, if so, how will they be computed?

8. Are Plaintiffs entitled to an award of attorney's fees against Metz and, if so, how will they be computed?

9. In any damage award in this action, are the damages to be apportioned between Metz and the Union and, if so, by what method are damages to be apportioned?

UNION, METZ AND INTERVENORS BUT NOT PLAINTIFFS BELIEVE THE FOLLOWING ARE CONTROVERTED ISSUES:

10. Whether plaintiffs are entitled to any damages?

11. What damages, if any, have plaintiffs sustained that were proximately caused by defendants' actions?

12. Whether plaintiffs were fully and fairly represented at the arbitration hearings and therefore this court lacks jurisdiction?

13. Which of plaintiffs have dropped out of the work force, or have had their employment terminated, as of what date, and does this stop their claim for damages?

14. Whether if this case is returned to arbitration, the arbitrator should consider all remaining issues with regard to causation and remedies including, but not limited to, issues relating to what would have occurred in negotiations and collective bargaining, whether a new agreement would have been reached, and how it would have resolved seniority issues, and what effect, if any, the purchase agreement would have on the arbitral process?

15. Is Metz required to continue to make payments into the Union pension fund for the benefit of any plaintiff who has retired and drawn benefits if the pension plan specifies that an individual may not be employed by Metz and simultaneously draw retirement benefits?

16. What are the legal effects of the offers of full-time Metz employment to certain of the plaintiffs with respect to claims for back pay, reinstatement/reemployment, future damages or other claimed damages?

17. Whether ordering new arbitration(s) or new negotiations comprises the appropriate remedies herein?

18. Whether negotiation is a proper remedy for determining the seniority rights of plaintiffs?

19. What is the legal effect of plaintiffs' failure to arbitrate their alleged rights to jobs at Metz following their layoffs and what is the legal effect of plaintiffs' failure to arbitrate their alleged seniority rights based upon seniority lists of Metz following their layoffs?

20. What would have happened if there had been negotiations between Metz and the Union on or about February/March 1983?

21. If there had been a vote on the subject of merging the work force of Metz and IBC in Omaha, what would have occurred?

22. If the Metz workers out-voted the IBC workers in the collective bargaining process, what would have been the results of such a vote?

23. Are the plaintiffs "new hires" with respect to Metz in February of 1983, and, if so, how long should and would Metz have employed them?

24. If plaintiffs were not "new hires" of Metz as of February of 1983, what is the nature and extent of their seniority compared to that of existing Metz workers at that time?

25. Whether plaintiffs or some of them are barred from claiming damages in view of the defenses of res judicata, collateral estoppel, election of remedies, waiver, estoppel and accord and satisfaction:

25a. Whether arbitrator James A. Doyle's Decision dated December 15, 1983 represents full and final adjudication of plaintiffs' claims for relief with respect to both severance pay and/or seniority rights and therefore those claims are barred by res judicata and collateral estoppel?

25b. Is the claim of 37 plaintiffs for severance pay inconsistent with their claim against Metz for lost seniority and have said plaintiffs elected a remedy by accepting severance pay?

25c. Whether pursuit and acceptance by plaintiffs of severance pay constituted a waiver, estopped plaintiffs from further inconsistent remedies, or represented an accord and satisfaction with respect to their seniority rights and severance pay and therefore bars plaintiffs from further relief?

PLAINTIFFS BUT NOT UNION AND METZ NOR INTERVENOR BELIEVE THESE ARE CONTROVERTED ISSUES:

26. Is mitigation of damages a defense which defendants ~~have~~ *can* properly ~~raised~~ *assert*?

27. Whether there are damages or relief to be awarded to the plaintiffs from the defendant Union with regard to the Union's failure to negotiate with the Defendant Metz regarding plaintiffs' seniority?

28. In the event that back pay, reinstatement, or future damages are found to be an appropriate remedy in this action, what is the basis for the consideration of such from the standpoint of seniority by reason of "end-tailing", "dove-tailing" or "plant-wide seniority" of IBC employees with Metz employees being "end-tailed"?

* * *

F. Witnesses.

All witnesses whom the plaintiffs expect to call to testify, except those who may be called for impeachment purposes only, are:

All Plaintiffs	All Intervenors
Bernard Clausen	Marlin Lessman
Louie Church	Harry Smith
Joe Cashen	Dayton Rasmussen, Jr.

James R. Funkhouser
William C. Metz
Kim B. Murphy
John Mullen
Dave Rome
JoAnne Lueck*
Jan Ohem*
David Brown
William H. Metz
Iola M. Turner
Betty A. Johnson
Dr. Robert Ottemann
Phillip Baker*
Wendall Olsen*
Honorable Richard Robinson

*Known rebuttal witness included at the request of the defendant Metz Baking Company.

All witnesses whom the defendant Bakery, Confectionery and Tobacco Workers Union Local #433 expects to call to testify except those who may be called for impeachment purposes only are:

1. Marlin Lessmann
2. Louie Church
3. Any witness named by any other party.

All witnesses whom the defendant Metz Baking Company expects to call to testify except those who may be called for impeachment purposes only are:

1. Wm. H. Metz
2. Wm. C. Metz
3. Henry Metz
4. Marlin Lessman
5. Roger Smith
6. Jim Funkhouser
7. Dave Brown
8. Doris Ryan
9. Louie Church
10. Bernard Clausen
11. Harry Smith
12. Dayton Rasmussen
13. Sandy Sutton
14. James A. Doyle

15. 79 people from whom affidavits were submitted by Metz in support of Metz' Motion for Summary Judgment
16. All people on Metz seniority list of February-March, 1983
17. Custodians of personnel records for the companies whose records are listed on the exhibit list
18. Custodians of hospital records for the physicians, medical groups, clinics, hospitals or other health care providers whose records are listed on the exhibit list
19. Custodian of records for Social Security
20. Custodian of records for Nebraska Department of Revenue
21. Custodians of records for the other government agencies whose records are listed on the exhibit list
22. All witnesses listed by plaintiffs, Union and Intervenor.
23. Dr. Daniel Miller
24. Dr. R.O. Forsman.

All witnesses whom the defendant intervenors expects to call to testify except those who may be called for impeachment purposes only are:

1. All Interevenors
2. Louie Church
3. Bernard Clausen
4. All plaintiffs' and defendants' witnesses.

G. Expert Witnesses.

Intervenor does not expect to call any expert witness with regard to this matter.

Defendant Union does not expect to call any expert witness with regard to this matter.

Plaintiffs expect to call the following expert witness(es) with regard to this matter:

1) Dr. Robert L. Ottemann.

Defendant Metz expects to call the following expert witness(es) with regard to this matter:

1) Anita Howell
2) Dr. Wayne Newkirk

H. Depositions and Other Discovery Documents.

None of the parties expect to utilize any deposition, answers to interrogatories and request for admissions or portions thereof, except for impeachment purposes or due to unavailability, except as follows:

1) All depositions or portions thereof which are expected to be offered in evidence by plaintiffs as part of plaintiffs' cases in chief are:

a) Deposition of Lewis Huston.

b) Deposition of Dale Burk.

Objections by defendant Union are:

By April 16, 1990

Objections by defendant Metz are:

By April 16, 1990

Objections by defendant Intervenors are:

By April 16, 1990

2) All depositions, answers to interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by defendant Union as part of the Union's case in chief are:

See list of Metz Baking Co., *infra*.

Objections by plaintiffs are:

By April 16, 1990

Objections by defendant Metz are:

By April 16, 1990

Objections by defendant Intervenors are:

By April 16, 1990

3) All depositions, answers to interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by defendant Metz as part of Metz' case in chief are:

(a) Metz does not anticipate utilizing any of the depositions unless for impeachment or because the witness is unavailable;

(b) Metz intends to utilize each of plaintiffs' answers to the following interrogatories: 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Objections by plaintiffs are:

By April 16, 1990

Objections by defendant Union are:

By April 16, 1990

Objections by defendant Intervenors are:

By April 16, 1990

4) All depositions, answers to interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by defendant Intervenors as part of the Intervenors case in chief are: *None*

Objections by plaintiffs are: *N/A*

Objections by defendant Union are: *N/A*

Objections by defendant Metz are: *N/A*

I. Length of Trial.

Counsel estimate that the trial will consume not less than 20 trial days *no more than 40 and probably about 30 days. This case can be called for nonjury trial on or after May 1, 1990.*

Illegible
U.S. ~~District Court Judge~~
Magistrate

APPROVED:

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APPENDIX E

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March 15, 1984

CERTIFIED – RETURN RECEIPT REQUESTED

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Omaha, Nebraska 68131

Re: BAKER'S LOCAL #433
(Metz Baking Company)
Case 17-CB-2865

Dear Mr. Rasmussen:

The above-captioned case charging violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted. The investigation reveals that, in about February, 1983, Metz Baking Company purchased a plant run by Interstate Brands Corporation (IBC) located in Omaha, Nebraska, and subsequently transferred its employees to the IBC plant. Metz allowed its employees to maintain their seniority, while treating former IBC employees as new hires for the purposes of seniority. Both groups of employees were represented by the union, and had

worked under identical contracts. The Union pursued a grievance to arbitration, which was held on April 26, 1983, and, due to the fact that it represented both groups of employees, took a neutral position in the arbitration and presented the arguments in support of both groups for purposes of seniority. As the arbitration occurred more than 6 months prior to the filing of the charge, issuance of a complaint on the Union's conduct at the arbitration is precluded by Section 10(b) of the Act. Further, under all the circumstances, there is insufficient evidence to show that the union failed in its duty to fairly represent the IBC employees at the arbitration.

The evidence reveals that on about July 12, 1983, a former IBC employee requested that the union pursue severance pay from IBC. Although the union initially indicated that it felt severance pay was not proper as employees continued to work for Metz, the Union subsequently pursued a grievance to arbitration, which was held on October 6, 1983, and was successful in obtaining severance pay for former IBC employees. Under these circumstances, including the fact that the Union's answer to the request of July 12, 1983 occurred more than six months prior to the filing of a charge, it cannot be said that the Union failed in its duty to fairly represent employees in this instance.

The investigation reveals that on about December 22, 1983, employees requested that the Union pursue a court determination on an issue as to whether the arbitrator's enforcement of a provision of the contract calling for a setoff of severance pay from employees eligible for early retirement constitutes age discrimination under the Equal Employment Opportunity Act. The Union responded to

this request by inviting employees who wished to pursue such an action to contact the Union to obtain legal assistance in preparing such a complaint. There is no evidence that employees accepted the Union's invitation. It cannot, therefore, be said that the Union failed in its duty to fairly represent employees in this instance.

The investigation also reveals that, on January 5, 1984, employees filed a grievance with the Union over the fact that their seniority with Metz was to be affected by the award of severance pay under the arbitrator's decision. The relief requested was to obtain a definitive answer from the Employer as to status of all affected members. The Union presented the grievance to the Employer and obtained a response from the Employer which satisfied the Union. The Union thereafter declined to further process the grievance. There is insufficient evidence to show that the Union's decision was based on any irrelevant or invidious reasons, but rather it appears the decision was based on the merits of the grievance.

Finally, the investigation reveals that the Employer prepared a proposed receipt to be signed by employees when collecting their severance pay under the arbitrator's decision. the Union objected to the proposed receipt, and subsequently a receipt was prepared which was satisfactory to the Union. The receipt indicates that its purpose is to satisfy claims for severance pay pursuant to the arbitrator's decision. As the Union agreed to the contents and the use of the receipt, it cannot be said that the union allowed the Employer to negotiate directly with employees regarding waiving rights in return for the receipt of severance pay. Under all the circumstances, it was determined that the union did not violate its duty to

fairly represent employees by agreeing to this receipt. Accordingly, I am refusing to issue a complaint in this matter.

See attached copy of Form NLRB-4938 for the procedure applicable for filing an appeal.

Very truly yours,

/s/ Thomas C. Hendrix

Thomas C. Hendrix
Regional Director

TCH/mln
Enclosure
cc: See page three

cc: Harry H. Smith, Attorney
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